IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.100 OF 2005

IN

SUIT NO.93 OF 2005

...

Vindokumar Takhatmal Kachhara ...Plaintiff

v/s.

Sohanlal Vardichand Dhakad

and ors. ...Defendants

...

Mr.Milind Vasudeo with Mr.H.V. Kode and Mr.S.A.Sawant for the Plaintiff.

Mr.Yogesh Thakur for Defendant No.1.

Mr.K.S.Tripathi for Defendant No.3.

...

CORAM: D.K.DESHMUKH, J.

DATED: 27TH JANUARY,2006

P.C.:

1. This Notice of Motion is taken out by the Plaintiff. The Plaintiff has filed the suit claiming a decree of declaration that the agreement dated 15th March, 2004 read with the Deed of Rectification dated 3-6-2004 in respect of Shop No.1 on the ground floor of the building SHREDDHA, which is described in prayer clause (a) is illegal. This deed is executed by Defendant No.1 in favour of Defendant No.2. The Plaintiff also claims for a decree of declaration that the first defendant who has executed that deed in favour of Defendant No.3 has no right, title or interest in the property. The Plaintiff also claims a decree of possession. According to the Plaintiff, the Plaintiff had entered into partnership with the Defendant No.1 Sohanlal and one lady by name Smt.Seemadevi Jain. The previous owner of this shop was one Mr.Madhukar. The partnership was dissolved by deed of dissolution dated 1st April, 1997. Copy

of that deed of dissolution is at Exh.D. As per that deed of dissolution , two partners of the firm apart from the Plaintiff withdrew from the business. The Firm was dissolved and the Plaintiff took over all the assets and business of the partnership firm. The Registrar of the Firm was also informed. An entry has been taken in the register of firms by the Registrar of Firms dated 14th October, 1997 that the partnership has been dissolved.

2. So far as the Defendant No.3, who is in possession of the shop is concerned, she claims the ownership of the shop on the basis of the agreement of sale dated 15th March, 2004 executed in her favour by the Defendant No.1. According to the Defendant No.3, she has purchased the shop from the Defendant No,1, who according to her, is the owner of the shop. According to the Defendant No.3, in the property card the plot on which the building is constructed, which has the suit shop stands in the name of the Defendant No.1, that the Defendant No.1 and the Plaintiff are related to each other as father-in-law and son-in-law. That the Plaintiff knew that the Defendant No.1 has transferred the shop to the Defendant No.3. The Defendant No.3 also relies on

some photographs which according to the Defendant No.3 show that the Plaintiff was present at the time of opening of the suit shop by Defendant No.3.

3. The learned Counsel appearing for the Plaintiff states that the Defendant No.3 is claiming her title through the agreement at Exh.F. That agreement is dated 15th March, 2004 i.e. about seven years after the partnership was dissolved and that agreement states that the agreement is being executed by the firm M/s.Shah Enterprises through the Defendant No.1, who claims to be its partner. The agreement further states that one Madhukar was the owner of the land, who transferred the land in favour of the firm by conveyance dated 27th September, 1995. It is further recited that thereafter the firm which was the owner of the property was dissolved and all rights, title and interest in the suit property on dissolution of the firm devolves on Defendant No.1. According to the learned Counsel this recital is contrary to the deed of dissolution to which the Defendant No.1 is a party and which shows that on dissolution of the firm the property devolves on the Plaintiff. Therefore, the Defendant No.1 had no title to the property when he transferred the same to the Defendant No.3, and

therefore, the Defendant No.3 has no right, title or interest in the property, because her vendor, the Defendant No.1, had no title.

4. Defendant No.1 has not filed any affidavit in reply. The Defendant No.3 is contesting the Notice of Motion. According to the Defendant No.3, the Plaintiff and the Defendant No.1 have played a fraud on the Defendant No.3. The learned Counsel for the Defendant No.3 submits that the Plaintiff knew all along that the property is being transferred by Defendant No.1 to the Defendant No.3. He has also participated in the function for opening of the shop, which shows that he was hand-in-golve with the Defendant No.1. The learned Counsel further submits that the property card of the property shows that the flat on which the building is constructed where the shop is situated belongs to the firm. According to the learned counsel, therefore, as the Defendant No.3 is in possession of the shop and she has also paid good consideration to the Defendant No.1 who is related to the Plaintiff, the possession of the Defendant No.3 of the shop should not be disturbed.

5. Now, if in the light of these rival submissions

the record of the case is perused, it becomes clear that only document on the basis of which the Defendant No.3 claims title is the agreement dated 15th March, 2004. Second recital of that agreement is relevant. Which reads as under:-

> "WHEREAS one Mr.madhukar Govind Nimdeve was the owner of the property bearing C.T.S.No.278, 278(1 to 3) at Belgarmi Road, Kurla (West) Mumbai 400 070 AND WHEREAS said Mr.madhukar Govind Nimdev by registered deed of conveyance dated 27th September 1995 sold his right title and interest in the said property with structure standing thereon in favour of the partnership firm of M/s.Shah Enterprises for the sale consideration price more specifically mentioned therein and thereafter said partnership firm stands dissolved and all the rights in respect of the said property stands devolved upon and in favour of the Developer herein;"

6. This recital clearly shows that the vendor of the Defendant No.3 claims to be the title holder of the property on the basis of the deed of dissolution

and he also states that before him it was the partnership firm M/s.Shah Enterprises, which was the owner of the property. It also states that that firm has been dissolved and on dissolution of that firm he has become the owner. Therefore, as the basis of the title of the vendor of the Defendant No.3 is the deed of dissolution, I asked the learned Counsel appearing for the Defendant No.3 to show me a copy of the deed of dissolution by virtue of which the firm ceased to be the owner of the property and the Defendant No.1 became the sole owner of the property. The learned Counsel is not in a position to show any such document. On the contrary, the Plaintiff has placed on record a copy of the deed of dissolution of the firm, which clearly states that the entire property of the firm has devolved on the Plaintiff on dissolution of the firm. What is interesting is that though the agreement in the above quoted recital states that the partnership firm has been dissolved, at the end of the document receipt of the consideration is acknowledged by the Defendant No.1 on behalf of the firm M/s.Shah Enterprises and he described himself as a partner of the firm. In my opinion, the theory of conspiracy and fraud by the Plaintiff and the Defendant No.1

together on the Defendant No.3 cannot be accepted. Because any prudent man who is parting with substantial amount will first ask to see the document of title, which his vendor claims to give him title to the property. Unless, the Defendant No.3 was in hand in glove with the Defendant No.1, she will not part with substantial amount which she claims to have parted with in favour of the Defendant No.1 without first seeing the deed of dissolution, which according her vendor the Defendant No.1 gave him title to the property. It cannot be believed that the Defendant No.3 will part with substantial amount without looking into the deed of dissolution. In any case, any prudent man would have questioned the Defendant No.1 on his signing the receipt as partner of the partnership firm, which the deed itself recites that it is already dissolved. The learned Counsel appearing for the Defendant No.3 is not in a position to give any explanation for this. Therefore, in my opinion, the theory of any fraud by the Plaintiff on Defendant No.3 has to be disbelieved. It appears from the record that the Defendant No.1 and the Defendant No.3 joined hands to deprive the Plaintiff of the property which he became entitled to because

of the deed of dissolution. Thus, the situation that emerges is that the Defendant No.3 has no title whatsoever to the property. In my opinion, even if it is assumed that the Defendant No.1 duped the Defendant No.3, then also the remedy of the Defendant No.3 would be to sue the Defendant No.1 for damages. In no case the Defendant No.3 can become the owner of the property of which the Defendant No.1 cannot claim to be the owner.

7. In these circumstances, therefore, as it is absolutely clear that the Defendant No.3 has no title to the property, it will be appropriate to appoint the Receiver on the property so that the property can be protected. Notice of Motion is, therefore, granted in terms of prayer clause (a).

Till the Receiver takes possession, ad-interim order in terms of prayer clause (b), excluding the bracketed portion.

At the request of the learned Counsel for the Defendant No.3, the Receiver is directed to take possession after a period of six weeks from today

...